

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JANICE BESELER,

Plaintiff-Appellee,

v

LEROY LACEY,

Defendant-Appellant.

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UNPUBLISHED

July 9, 2002

No. 223079

Wayne Circuit Court

LC No. 97-736279-NI

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

In this no-fault action for noneconomic damages, defendant appeals of right from the trial court's order granting plaintiff's motion for additur and awarding plaintiff \$4,500 in damages. We reverse and remand to the trial court for entry of judgment on the jury's verdict, which found that plaintiff suffered a serious impairment of body function as a proximate cause of defendant's negligence, but awarded plaintiff zero dollars in damages.

I. Facts and Proceedings

Plaintiff was a passenger in the front seat of a car being driven by her fiancé, Dwayne Johnson, when the car stopped running. Johnson was able to steer the car to the left-hand turn lane, after which he got out of the car to look under the hood. Johnson successfully restarted the car, and immediately thereafter the car was hit from behind by another car being driven by defendant. Plaintiff, who was wearing her seatbelt at the time of the accident, testified that the impact of the collision was "very fierce," and that it caused her body to move around "like a rag doll." Just prior to impact Johnson had screamed out a warning and while plaintiff did not hit anything inside the car, she had braced herself against the dashboard before impact and her knees were pushed into her chest as a result.

When the police arrived at the accident scene, plaintiff informed them that she did not believe she was hurt, and that it was not necessary to have an ambulance come to the accident scene on her behalf. Because plaintiff's car was not drivable, the police drove plaintiff, her daughter, and Johnson home. Plaintiff claimed that about an hour and a half after she returned home, she turned her head to the side to speak to Johnson, felt tightness in her neck, and was unable to turn her neck back toward the front. Plaintiff then called a cab and went to the emergency room at Saratoga Hospital.

At the emergency room, plaintiff complained of aches in her head, neck, back, arm and knees. X-rays showed no broken bones, and plaintiff was released from the hospital with prescription medication for pain and muscle relaxation, and a neck brace which she wore for only several days before removing it because of a rash. Approximately two weeks after the emergency room visit, plaintiff began follow up visits once a week for six weeks with her regular doctor at Hamtramck Health Center. These visits were discontinued after her doctor informed her that her health insurance would not cover any further treatment. While Johnson had no-fault coverage, plaintiff apparently did not submit a claim for medical expenses to Johnson's insurance carrier. At this stage of her recovery, plaintiff claimed she was unable to complete daily activities such as laundry, biking, walking, sitting or standing for extended periods of time, or giving her children baths. She also testified that because she could not stand for extensive periods of time, she had difficulty cooking. Further, because she could not walk or ride a bike, she was unable to go to the park or play with her children. Plaintiff also testified that because of her injuries she was forced to rely on Johnson and her children for help, which caused her depression and caused her children to become angry and resentful that they had to assist in household chores.

Plaintiff testified that she briefly resorted to "at home remedies," such as oatmeal soaks and hot and cold therapy, to relieve the pain associated with her lower back muscle spasms, stiff and throbbing neck, and shooting pains in her knee, and then sought treatment from Dr. Sonya Wilson, a chiropractor recommended by her attorney. Plaintiff received treatment three times a week from Dr. Wilson consisting of manipulation of her spine, heat treatment, and massage, for a period of thirteen months. Plaintiff claimed that when her treatment with Dr. Wilson concluded she had not totally recovered from the accident, that her activities were still very limited, and that she was unable to do strenuous activities. However, plaintiff testified at trial that she was then (at the time of trial) able to ride her bike and that her life was "almost back to normal."

Dr. Wilson testified that plaintiff's injuries were objectively manifested by muscle spasms, trigger points, range of motion, and motion palpation. She also testified that muscle spasms are involuntary, that they limit range of motion, and that they can be observed by placing a hand over the area and comparing it with a comparable muscle. Dr. Wilson further testified that she was certain plaintiff's injuries were caused by the accident and that plaintiff's treatment ended because even though plaintiff had not returned to her pre-accident condition, there was nothing more she could do to help plaintiff.

At the close of plaintiff's proofs defendant moved for directed verdict, contending that the evidence failed to establish that plaintiff had suffered a serious impairment of body function. The trial court denied the motion, finding the existence of a question of fact on this threshold question. Thereafter in his case-in-chief, defendant presented the videotaped deposition testimony of Dr. Annette G. DeSantis who testified that she found no objective manifestation of a serious impairment of plaintiff's back, shoulder, neck or knees.<sup>1</sup>

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<sup>1</sup> This deposition testimony was not made a part of the lower court record and we are unable to examine it; however, it is not disputed that this was the substance of Dr. DeSantis' testimony.

During the trial defendant admitted that his negligence was the sole cause of the accident,<sup>2</sup> and the jury was instructed that it was to decide only whether plaintiff was entitled to noneconomic damages. Specifically, the trial court instructed the jury, in part, as follows:

The defendant has admitted that he was negligent. You are to decide only what damages, if any, were caused by the defendant and the amount to be awarded to the plaintiff for such damages.

One of the elements plaintiff must prove in order to recover non-economic loss damages in this case, is that she sustained a serious impairment of a body function.

A serious impairment of a body means an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead her normal life.

An impairment does not have to be permanent in order to be a serious impairment of a body function.

In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.

The phrase important body function has no special or technical meaning in the law and should be considered by you in the ordinary sense of its common usage.

If you find the plaintiff suffered serious impairment of body function but her injury has ceased or may in the future cease to be a serious impairment of body function, that fact will not relieve defendant from liability for any non-economic loss damages suffered by the plaintiff as a proximate result of defendant's negligence.

In order to recover damages for noneconomic loss, plaintiff has the burden of proof on each of the following three elements:

One, that the plaintiff was injured;

Two, that the negligence of the defendant was a proximate cause [sic] of the injury to the plaintiff;

And three, that plaintiff's injury resulted in a serious impairment of a body function.

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<sup>2</sup> Because defendant died before trial, this admission was made by defendant's counsel on behalf of defendant's estate.

If you decide that all three of these elements have been proven, then plaintiff is entitled to recover damages for noneconomic loss that you determine the plaintiff has sustained as a result of that injury.

The court will furnish you the special verdict form that will list the question you must answer. The answers to the questions on the verdict form constitute your verdict.

If you decide that plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates her for each of the elements of damage of which you decide has resulted from the negligence of the defendant, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by plaintiff to the present time: physical pain and suffering resulting from her back strain, lower back strain, muscle spasms and bruising.

The disability including the loss and impairment of her neck and back, mental anguish, denial of social pleasures of enjoyment, embarrassment, humiliation or mortification.

Which if any of these elements of damage has been proved is for you to decide based on evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for these elements of damage cannot be proved in a precise dollar amount. The law leaves such an amount to your sound judgment.

The jury deliberated for just over one hour and returned a verdict finding that plaintiff had sustained an injury resulting in serious impairment of a body function, that defendant's negligence was the proximate cause of plaintiff's injury, and that plaintiff was not entitled to damages.<sup>3</sup> When polled by the trial court, all six jurors stated agreement with the verdict. The trial court accepted the verdict and dismissed the jury without objection from plaintiff.

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<sup>3</sup> The special verdict form was answered by the jury as follows:

**SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted as follows:

**QUESTION NO. 1:** Was the plaintiff injured in one or more of the ways claimed?

Answer: yes (yes or no)

If your answer is "yes", go on to Question No. 2.

If your answer is "no", do not answer any further questions.

(continued...)

Defendant filed a motion for entry of judgment on the jury's verdict and plaintiff, arguing that the jury's verdict was inconsistent in finding that plaintiff suffered a serious impairment of body function but was not entitled to damages, moved for additur or alternatively for a new trial. The trial court first granted defendant's motion, and ordered that the judgment would reflect that the jury found plaintiff had suffered a serious impairment of body function, but was awarded no damages. The trial court then found that "given the inconsistency of the . . . verdict here, I think she is entitled to some award of damages." Accordingly, the trial court granted plaintiff's motion for additur, and "assess[ed] damages in the amount of \$4,500." This appeal of right ensued.

## II. Standard of Review

This Court reviews a trial court's decision granting a motion for a new trial for an abuse of discretion. *Kelly v Builders Square*, 465 Mich 29, 34; 632 NW2d 912 (2001). Likewise, a trial court has discretion to grant or deny a motion for additur, and we will not disturb its decision unless there has been a palpable abuse of discretion. *Id*; see also *Palenkas v Beaumont Hosp.* 432 Mich 527, 533; 443 NW2d 354 (1999); *Joerger v Gordon Food, Inc.*, 224 Mich App 167, 172; 568 NW2d 365 (1997). We review de novo any questions of law that arise. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

## III. Analysis

Defendant asserts that the trial court erred by granting plaintiff's motion for additur. We agree.

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(...continued)

**QUESTION NO. 2:** Was the defendant's negligence a proximate cause of the injury to the plaintiff?

Answer: yes (yes or no)

If your answer is "yes", go on to Question No. 3.

If your answer is "no", do not answer any further questions.

**QUESTION NO. 3:** Did the plaintiff sustain an injury that resulted in serious impairment of body function?

Answer: yes (yes or no)

If your answer is "yes", go on to Question No. 4.

If your answer is "no", do not answer any further questions.

**QUESTION NO. 4:** What is the total amount of plaintiff's damages for noneconomic loss for her injury?

Answer: \$ 0.00

The grounds for granting a new trial are codified at MCR 2.611(A)(1), which provides the only bases upon which a jury verdict may be set aside. *Kelly, supra* at 38. The grounds for granting additur are found at MCR 2.611(E)(1), which provides:

If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for a new trial *on condition that within 14 days the nonmoving party consent in writing* to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support. [Emphasis added.]

In awarding plaintiff \$4,500 in damages, the trial court abused its discretion in several respects. First, it failed to follow the dictates of MCR 2.611(E)(1), which only permits additur with the written consent of the nonmoving party. If the nonmoving party does not consent, the only relief available to the moving party is for the trial court to grant the motion for new trial filed in the alternative. In this case, defendant did not consent to the trial court's additur award and therefore it was invalid. See *Galvan v Summers*, 375 Mich 285, 286, n 1; 134 NW2d 177 (1965), *Chapin v Bechler*, 103 Mich App 629, 635; 303 NW2d 46 (1981), and MCR 2.611(E)(1). Second, the conditional additur award must be the lowest amount the evidence will support, necessitating some specific findings by the trial court to support the award. The trial court made no such findings in support of its additur award. Third, since defendant did not consent to the additur award, as we noted above the trial court could only provide relief to plaintiff by granting in the alternative plaintiff's motion for new trial. However, the trial court's statement that the verdict was "inconsistent" is not a ground codified in MCR 2.611(A)(1) for granting a new trial. *Kelly, supra* at 39. Accordingly, the trial court made no findings which would support in the alternative the grant of a new trial. We must therefore conclude that the jury verdict should not have been disturbed.

#### IV. Conclusion

The trial court erred by granting plaintiff's motion for additur without the defendant's consent, MCR 2.611(E)(1). In addition, the limited findings made by the trial court do not support the alternative motion to grant a new trial as sought by plaintiff. MCR 2.611(A)(1). Accordingly, we reverse the trial court's entry of judgment awarding plaintiff damages in the amount of \$4,500, and remand for entry of judgment on the original jury verdict of zero dollars in damages. In light of these findings, we need not address the remaining question raised by defendant on appeal.

We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Kurtis T. Wilder  
/s/ Jessica R. Cooper